No. 16340

In the United States Court of Appeals for the Ninth Circuit

STEVE WINN AND EDITH WINN, APPELLANTS,

v.

UNITED STATES OF AMERICA, APPELLEE

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF IDAHO, SOUTHERN DIVISION

BRIEF FOR THE UNITED STATES, APPELLEE

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OPINION BELOW

The district court did not write an opinion.

JURISDICTION

This is an appeal filed October 27, 1958 (R. 25), from a judgment (R. 22-24) filed on September 29, 1958, awarding just compensation for property condemned by the United States. The jurisdiction of the district court was invoked by the United States under the Act of August 1, 1888, 25 Stat. 357, 40 U.S.C. sec. 257; the Act of February 26, 1931, 46 Stat. 1421, 40 U.S.C. sec. 258(a) to (e); and the "Federal-Aid Highway Act of 1956," approved June 29, 1956, 70 Stat.

374, which authorizes the acquisition of land or interests in land, including the control of access thereto from adjoining land, required for the construction, reconstruction, or improvement of any section of the National System of Interstate and Defense Highways (R. 3-4). The jurisdiction of this Court is invoked under 28 U.S.C. sec. 1291.

QUESTIONS PRESENTED

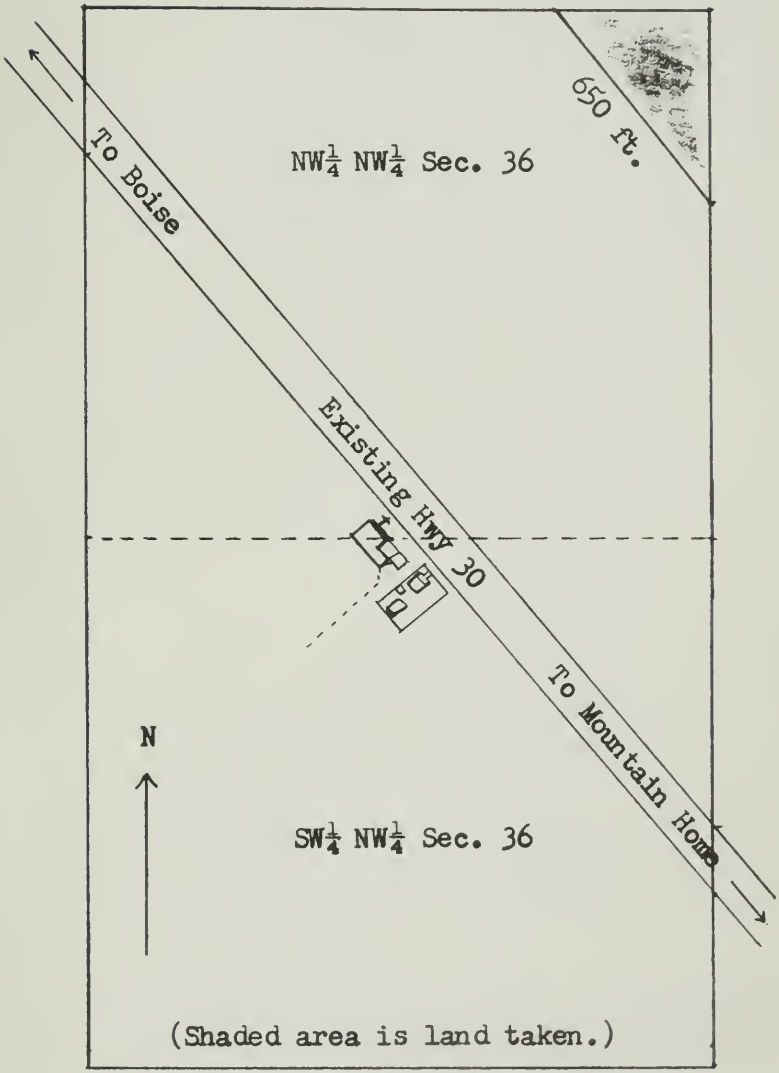
1. Whether one from whose grazing land a small corner is condemned for a limited access highway may, under the guise of severance damage, compensation for loss of access or otherwise, recover for diversion of traffic from the existing highway through his land and the consequent loss of business to commercial establishments on that highway.

2. Whether such landowner is entitled to compensation for being denied direct access to that new highway and, if so,

3. Whether any sufficient offer of proof of damage because of loss of such access was made.

STATEMENT

On June 13, 1958, the United States instituted proceedings to condemn 29.27 acres of land, 2.38 acres of which belonged to appellants, for Idaho Highway Project I-3022(7), a portion of the National System of Interstate and Defense Highways running between Mountain Home and Boise, Idaho (R. 3-10). The 2.38 acres taken from appellants constituted the northeast corner of appellants' holding, which consisted of one-half of a quarter section (see diagram on opposite page.) Appellants' tract is bisected diagonally from



Appellants own W½, NW¼, Sec. 36,
Twp. 2S., R. 5E., B.M.

northwest to southeast by U. S. Highway 30, and in the middle of their tract, on U. S. 30, the appellants conduct a business known as the Rock Shop (R. 66). There is also at that point a service station known as the Crater Station, concerning which no claim is made, presumably because appellants do not operate it (R. 57). Some 14 acres in the heart of the tract either are devoted to commercial uses (R. 40-41, 42 *et seq.*) or are under contract of sale [1] (R. 45, 55). The property is located eight miles out of Mountain Home, which means it is some 35 miles from Boise (R. 65). On September 24 and 25, 1958, a jury trial was held to determine just compensation for this parcel, commencing with a view of the premises (R. 18-21).

The first witness for the Government, Richard A. Maule, a civil engineer with the Idaho Department of Highways, described the new Interstate Highway and and how much of the appellants' land would be involved (R. 29-30). On cross-examination it was brought out that the appellants would have 650 feet of frontage on the Interstate but that they would not have access to it (R. 30). Appellants will have to travel 4.8 miles toward Mountain Home or some eight miles toward Boise to reach the closest interchanges by which they can get onto the Interstate (R. 31-32). After the completion of the Interstate, the appellants

[1] Mr. and Mrs. O. O. Mabe, the purchasers in this sale, moved to intervene in this suit as parties defendant on the grounds that they were contract purchasers of a part of the larger portion from which Tract No. 5 was taken and that they had a financial interest in and ownership of the right of access to, from and between the Interstate Highway and the property being purchased under contract of sale. This motion was denied without prejudice in open court on September 24, 1958, at the trial of this suit (R. 18).

will no longer be able to use U.S. 30 to reach Boise, because U.S. 30 is to be obliterated at a point between appellants' land and Boise where it and the Interstate intersect. However, U. S. 30 is to remain unchanged as it now runs through appellants' property and they will be able to use it to travel the 4.8 miles toward Mountain Home to gain access to the Interstate (R. 32-34).

Vernon C. Turner, the Government's second witness, testified concerning the market value of the property taken. He stated that the highest and best use of the land taken was dry land grazing, the use being made of it at the time of the taking. He further testified that the parcel taken was worth $100, and that the value of the whole tract had been reduced from $3,150 to $3,050. He had based these figures on his determination that the land was worth $50 per acre. In his testimony on the whole tract, Turner was quite careful to exclude the 13 or 14 improved acres in the middle of the tract (R. 40-41), and on cross-examination (R. 42-51) he made it quite clear that he did not consider this improved acreage as part of the same unit from which the 2.38 acres had been taken. Appellants' counsel made repeated efforts to get Turner to testify on the value of the commercial acreage and on the value of the appellants' land including the commercial acreage, but Turner refused to do so, not having appraised this acreage. Turner explained why he had not appraised this 14 acres as follows (R. 43):

> It was my feeling that through the unity of use rule the fourteen acres where the improvements are located had no bearing on the other

> land which are [sic] designated as dry grazing and not dependent on each other.

Shortly after that, he explained why he had excluded 14 acres from the whole tract instead of just the two or three acres on which appellants' buildings sit (R. 45):

> I believe there is 12 point some odd acres, 12.67 acres which is under a contract for sale and when I say fourteen acres that's a round figure assuming that the difference between the fourteen and the 12.67 would be the adequate ground that the other improvements owned by Mr. Winn do set upon.

Finally, when appellants' counsel tried to get Turner to consider the effect of loss of access to the property, Turner interrupted him with this answer (R. 50):

> —Mr. Jeppesen, by the rules by which an appraiser is governed there are certain things that you take into consideration and there are certain things that you do not take into consideration, until such time that I am instructed that circuitous travel is compensable I cannot consider it.

Appellants' first witness was an appraiser, Emett Newel. When appellants' counsel asked Newel's opinion of the market value of the Winn property just prior to the taking, the United States objected to the question on the grounds that it went far beyond the scope of the trial. Appellants' counsel argued that to fix severance damages it is proper to inquire

into the before and after values of the property. The trial court ruled on the objection as follows (R. 55-56):

> So as to make this clear to you I will say that the amount of damage that will be allowed will be the value of this tract of land that is being taken without regard to the fact that the freeway is being built. In other words, the Court cannot allow you any damages because the road is being built farther away from the defendant's property. The United States Law under which this freeway is being built provides that there is to be no gas stations or other places of business along the freeway where it is the duty to build an access road. In other words—this Court has viewed this property, with the consent of counsel, and the defendant will not be permitted to move his property—his buildings—which I understand he has sold—over to the highway. He couldn't move them over to the highway and have access from the highway to the buildings, and he couldn't require the government to build an access road from the highway to his property. So the only thing I can submit to the jury is the value of this tract of land cut off from this place, what damage it does to the place, this small tract from the outside corner. I think I have made that clear.

Then appellants' counsel made an offer of proof on what he had hoped to show by Newel's testimony (R. 56-57):

> Your Honor, we will offer to prove by this witness if permitted to testify—let me put it this way:

> This witness Mr. Emett Newel, if permitted, would testify that the defendant Winn had approximately 67 acres of land in one continguous tract divided only by the present highway which runs through the property. There are no fences on either side of the highway except the fence around one building. That the total value of the property as of the date immediately preceding the taking on June 13, 1958, was the sum of $11,380.00, and the witness will also testify that the land has a principal value as commercial property and a small use for grazing but that it has a potential on both sides of the highway as commercial property. That after the taking, the property as commercial property is valueless, that it has some value as grazing and also future farm land if something develops out there, which is speculative, so that the value after taking, of the entire tract is $2,400.00 and that the difference between the two values before and after is $8,980.00.

The trial court concluded from this offer that this opinion must be based on the fact that the new highway is to be constructed some distance from appellants' place and that they would not have access to the new highway (R. 57). Despite the court's ruling and the Government's objection, Newel testified that the before taking value of appellants' land was $11,380 and that the after taking value was $2,400 (R. 58-59). On cross-examination (R. 60-63), he testified that he had valued the land actually taken at $35 an acre and agreed that the total for the 2.38 acres would be somewhere in the neighborhood of $85. To arrive at his

before taking value for all of appellants' land, he had appraised the buildings and improvements. When asked what damage the taking would cause the buildings, Newel said that it would do no physical damage. When asked if appellants' improvements would have been damaged just as much if the new highway had missed appellants' land entirely, Newel answered that the damage would have been the same. Newel then admitted that his appraisal was based on loss of access, on the fact that after the Interstate is finished no one will drive eight or nine miles to reach appellants' place of business. The court then sustained a motion to strike Newel's opinion because there was no proper foundation for it, and then sustained an objection to an attempt to reintroduce it (R. 64-65).

The last witness was appellant Steve Winn. He testified that people coming from the west, from Boise, would now have to go 4.8 miles past his place of business and then come back in order to reach it. Appellants' counsel tried to get into the record Mr. Winn's opinion of the before and after taking value of his land, but the court sustained the Government's objection to this testimony, though Mr. Winn did say that he thought the property was worth over $20,000. Then appellants' counsel made another offer of proof, this time stating that he had intended to show that the appellants' business would be rendered valuless because of the disruption of access to it and that the land would thereafter be useful only for grazing and worth only $2,500. Mr. Winn then testified that he had about $1,000 invested in signs along U.S. 30, but this testimony was stricken after cross-examination showed that the taking itself had no effect on these signs.

Of the instructions to the jury, only the following two are of concern on this appeal (R. 74):

> The fact that the relocation of the Interstate Highway may deprive the defendant here of profits incidental to his business is not an element of damages. The Government in the exercise of its lawful Governmental powers retains power to relocate highways within the State.
>
> * * * * *
>
> The owner of property abutting on a highway has a special and peculiar right in such highway not common to other citizens. That right is a property right appurtenant to his land and furnishes him the means of getting to and from his property, known in law as a right of access, and is a right which cannot be taken or materially interfered with by the State without payment of just compensation.
>
> This instruction does not apply to the new highway, but just to the old highway.

Appellants' counsel objected to both of these instructions and then offered five more, four of which the trial court refused to give and one of which (No. 2) it had already given (R. 84-86). Appellants' requested instruction No. 1 would have made the measure of damages "the difference in market value of their property before the taking of any if it by the State as compared to its market value after the contemplated new highway is built." No. 3 would have instructed the jury that all damages must be assessed in one pro-

ceeding and that the damages must cover all loss reasonably to be anticipated to result from the taking "and from the use to which the State proposes to put the property taken." No. 4 would have charged the jury to "take into account the uses to which the property may be most advantageously used prior to the taking as compared with the uses to which the property can be most advantageously applied after the part claimed by the State has been taken and put to the use proposed by the Plaintiff," and then to determine the difference between the before and after values. No. 5 would have told the jury that it could "consider the manner in which it is proposed to construct the new highway across his property and the effect that such proposed construction will have on the market value of the Defendants' remaining property."

On September 25, 1958, the jury returned a verdict of $100 (R. 21), for which amount judgment was entered on September 29, 1958.

ARGUMENT

Appellants' specifications of error boil down to the following basic contentions: (1) the trial court should have allowed the jury to consider the effect of the building of the new highway on appellants' business and (2) the trial court should have allowed the jury to consider the damage suffered by appellants because of loss of access. The error of appellants' arguments flows primarily, we believe, from failure to distinguish between the two access problems here presented. When the effect, if any, of the taking upon appellants' existing access to U.S. 30 is considered independent of any damage because appellants are denied direct

access to the Interstate, the correctness of the district court's rulings becomes clear.

I

The Trial Court Properly Refused to Allow the Jury to Consider the Effect of the Building of the New Highway on Appellants' Business

A. *Any damage to appellants' business results not from the taking itself but rather from the diversion of traffic to the Interstate Highway, and thus such damage is not compensable:*—The appellants never explicitly state that they should be allowed compensation in this suit for damage to their business, but even a cursory examination of the record and argument reveals that it is business loss for which they seek recovery. Of course, an explicit argument asking payment for business loss would be contrary to the well-settled rule that such losses are not compensable in eminent domain actions. *Joslin Co.* v. *Providence,* 262 U.S. 668, 675 (1923); *Mitchell* v. *United States,* 267 U.S. 341, 345 (1925); *United States* v. *Petty Motor Co.,* 327 U.S. 372, 377-378 (1946). So instead of asking the court for damages to their business, appellants ask for damages for loss of business access (discussed in II, A, *infra,* p. 19), or urge that they should have been allowed to show the value of their business property as part of the before value of their property (discussed in I, B, *infra,* p. 17).

The fact is clear that the damage of which appellants complain arises solely from the circumstance that the opening of the new highway will divert the traffic upon which appellants' business relied for customers. This diversion constitutes, we submit, simply frustra-

tion of a business opportunity, which is noncompensable. *Omnia Commercial Co., Inc* v. *United States,* 261 U.S. 502, 513 (1923); *United States ex rel. T. V. A.* v. *Powelson,* 319 U.S. 266, 282 (1943). Appellants' situation is no different from that created when the United States acquires a residential area, thereby depriving utilities companies of customers. The utilities companies cannot recover for the resulting loss. *Southern Counties Gas Co. of Cal.* v. *United States,* 157 F. Supp. 934 (C. Cls. 1958), cert. den. 358 U.S. 815 (1958); *Kellettville Gas Co.* v. *United States,* 56 F. Supp. 919 (W.D. Pa. 1944). To the same effect are *Fix* v. *City of Tacoma,* 171 Wash. 196, 17 P.2d 599 (1933), and *Deepe* v. *United States,* 103 Colo. 294, 86 P.2d 242 (1939), involving, respectively, a water company and a telephone company. Cf. *Public Water Supply District No. 3* v. *United States,* 133 C. Cls. 348, 135 F. Supp. 887 (1955). Consideration of the consequences of acceptance of appellants' argument demonstrates its error. We are today embarking on a multi-billion dollar federal thruway program to supplement the various state undertakings to solve the automobile transportation problem which is approaching a crisis. The program has been characterized as a "million dollar a mile" undertaking. That figure would be greatly enlarged if every filling station operator, motel owner or other businessman on the present highways could recover when traffic is diverted because of road improvements. The possibility of loss of customers because of change of highways, depopulation of the area due to federal activities, or otherwise, is merely one of the risks of doing business. The public is not a guarantor of a successful business.

But even if business losses were compensable in eminent domain proceedings, appellants still could not recover their business losses here because they have not resulted from the condemnation. The United States in this action took 2.38 acres of what the evidence shows to be grazing land (R. 39-40) without touching or doing any physical damage to appellants' buildings (R. 60) or signboards (R. 70). Any damage to appellants' business, real and serious though it may be, results not from the condemnation of the corner of their tract of land but from the building of the new Interstate Highway. This fact is demonstrated by appellants' offer of proof of what Mr. Newel's testimony would show and the argument on this offer of proof (R. 56-58), by Mr. Newel's admission on cross-examination that appellants' business improvements would have been damaged just as much if the new highway had missed appellants' property entirely as it is under the present state of facts (R. 61), and by Mr. Winn's testimony that the construction of the highway would take his living away and leave him stranded on the desert even though the taking did no physical damage to the signs or buildings (R. 70-71). It is clear that this factual situation brings this case under the general rule that damages which are the incidental result of lawful government action are consequential and do not constitute a taking for which compensation may be secured under the Fifth Amendment of the Constitution. *Bedford* v. *United States,* 192 U.S. 217, 225 (1904); *Manigault* v. *Springs,* 199 U.S. 473, 484 (1905); *Sanguinetti* v. *United States,* 264 U.S. 146, 149-150 (1924).

Appellants make the argument (Br. 25) that the

Idaho Code "requires that payment be made not only for property 'taken' but also for property 'damaged.'" Such an argument is not relevant in this suit since it is brought under the federal Constitution. That consequential damage is not compensable is clear not only from the cases cited above but from *Richards* v. *Washington Terminal Co.,* 233 U.S. 546, 554 (1914), which points out that many state constitutions include the language appellants quote from the Idaho Code precisely because the constitutional concept of just compensation does not include consequential damages. That federal condemnation suits are brought under the federal Constitution and federal law cannot be questioned. *United States* v. *Miller,* 317 U.S. 369, 379 (1943); *United States* v. *93.970 Acres of Land,* —— U.S. —— (June 22, 1959).

Appellants' case with respect to business loss is not basically any different because some of their land has been taken than it would be if none had been taken, for their loss does not result from the use made of appellants' old land but from the whole Interstate Highway project in their area. In other words, the loss results from the use to be made of *other* land in the same project. It has long been settled that no compensation can be included for diminution in value of the remainder of a condemnee's land due to the use of *other* land in the project. *Campbell* v. *United States,* 266 U.S. 368, 371 (1924); *Richards* v. *Washington Terminal Co.,* 233 U.S. 546, 554 (1914). Also see *Boyd* v. *United States,* 222 F. 2d 493, 494 (C. A. 8, 1955); *United States* v. *Kooperman,* 263 F. 2d 331, 332 (C.A. 2, 1959).

In *United States* v. *Grizzard,* 219 U.S. 180 (1911),

relied upon by the appellants, it is clear that the court in determining severance damage was concerned with the use being made by the Government of the very land taken from the respective condemnees. The land taken from Grizzard lay between the remaining portion of his farm and his former access road, and the court noted (p. 183) the special injury to the remaining land resulting from the taking:

> The damage to the land not appropriated is the obvious consequence of the taking of a part of the whole by flooding—a manner of appropriating which has made the village market, church and school so inconvenient of access as to add some three miles of travel by an unimproved and roundabout country road. Whenever there has been an actual physical taking of a part of a distinct tract of land, the compensation to be awarded includes not only the market value of that part of the tract appropriated, but the damage to the remainder resulting from that taking, embracing, of course, *injury due to the use to which the part appropriated is to be devoted.* (Emphasis added.)

The distinction between the special damage recoverable and the general damage which is not was spelled out in *Boyd* v. *United States,* 222 F. 2d 493, 495 (C.A. 8, 1955), as follows:

> Appellants therefore could not claim a right to prove or recover for any diminution in value which might be occasioned to their remainder by the fact that it was being made to adjoin an air base generally, of which their 15.7 taken-acres were to constitute merely some slight, incidental

or abstract segment—for example, a vacant border area—having no specifically demonstrative and directly affective utilization or function. Any depreciating injury which would exist to their remainder in such a situation would have to be regarded legally as being simply a consequence from the air base generally and as not being provably a product of their 15.7 taken-acres. And in respect to such a general, depreciating injury only, appellants would, of course, be in no different position of damage than their neighbors, whose farms the air base also adjoined, although none of their land had been appropriated for inclusion therein.

Hence, only as appellants might be able competently to establish—from the plans and scope of the undertaking, the location of and the part intended to be played by their 15.7 taken-acres therein, and other definitive, probative elements in the situation—that their included tract was intended or would be reasonably likely to have some particular utilization in the project, which from its nature and immediacy to their remainder, would make it capable of contributing *a direct and identifiable element of depreciation,* out of the componency of that which otherwise, as a matter of legal certainty, would simply be attributed to the project generally or as a whole, could there exist any basis for such injury or damages to their remainder as appellants here claim that they were denied the right to prove and recover for. (Emphasis added.)

The court went on to cite *West Virginia Pulp & Paper Co.* v. *United States,* 200 F. 2d 100 (C.A. 4, 1952), as a case illustrating what "might with adequate certainty constitute a direct and identifiable element of depreciation so as to afford a possible basis for proof and recovery." There gasoline storage tanks had been built on the piece of land taken and the appellate court held that it had been error to refuse to let the landowner produce evidence showing this fact. Appellants have completely failed to show any direct and special damage to them as a result of use of the 2.38 acres taken from them as distinguished from use of the highway as a whole. Cf. *Nunnally* v. *United States,* 239 F. 2d 521 (C.A. 4, 1956).

B. *The land on which appellants' business is situated is not part of the unit from which land was taken:*— Appellants persistently tried to introduce evidence of the before and after values of their full holding, including the value of their commercial improvements (R. 47-48, 54-59, 64-65, 67-70), and requested that the jury be instructed to consider these before and after values (R. 85). Though subtracting the value of the condemnee's full holding after the taking from its value before the taking is a proper way to arrive at condemnation damages including severance damage, inclusion of the business property in the computation here would violate the basic severance damage rule that severance damages can be awarded only on a tract which was part, with the land severed, of a single unit. *United States* v. *Honolulu Plantation Co.,* 182 F. 2d 172 (C.A. 9, 1950), cert. den. 340 U.S. 820.

The evidence shows (R. 39-40) that the land taken was grazing land, but appellants were trying to show

the reduction of value of their commercial as well as of their grazing land. The fact that the commercial property was not set off from the grazing land by any physical partition, such as a fence or a road (R. 46, 56), does not lend any validity to any claim of unity between the land taken and the commercial property, because "integrated use, not physical contiguity," is the severance damage test. *Baetjer* v. *United States,* 143 F. 2d 391, 395 (C.A. 1, 1944). Also see *West Virginia Pulp & Paper Co.* v. *United States,* 200 F. 2d 100 (C.A. 4, 1952). It takes no citation of authority to show that selling souvenirs to tourists and using land for grazing are two different uses. The simple fact of the matter is that there was no unity of use in this case.

Further refutation of any unity of use argument is a fact alluded to (R. 45, 55) but not spelled out in the record, the fact that 12.67 acres in the midst of appellants' holding are under a contract of sale. These 12.67 acres include a cafe and service station and adjoin appellants' commercial improvements. Plainly this tract is not being sold for grazing use; no more is appellants' Rock Shop being used for grazing.

Finally we should point out that the severance damage to appellants' remaining grazing land was taken into consideration by the Government's appraisal witness (R. 40-41). Mr. Turner testified that before the taking appellants' tract was worth $3,150 and that after the taking it was worth $3,050. But he was careful to note that he had excluded from these valuations the 14 acres where the commercial improvements are located. On cross-examination, Mr. Turner made it quite clear that he had excluded these 14 acres

from his valuation because he thought that including them would violate the unity of use rule discussed above (R. 43). This exclusion was quite proper. On the other hand, we should note that appellants never tried to introduce before and after values which did not include the value of the commercial property. Consequently, the only proper severance damage evidence before the jury was that given by Mr. Turner.

II

The Trial Court Properly Refused to Allow the Jury to Consider the Damage Claimed by Appellants Because of Loss of Access

The basic reason the trial court was correct in excluding evidence on loss of access and in refusing to instruct the jury to consider loss of access is simply that the taking here had no effect on any existing right of access. We shall consider separately the question of whether appellants' existing access rights have been damaged and the question of whether appellants ever had any access rights to the Interstate Highway.

A. *Any damage to appellants' existing access rights results from the Interstate Highway project as a whole and not from this condemnation and thus is not compensable:*—The same general principles discussed in Point I, A (*supra,* p. 11), are applicable to the actual loss of access of which appellants complain. Any actual loss is an incidental result of a lawful government action and thus not compensable in a condemnation action. And once again we can say that *United States* v. *Grizzard,* 219 U.S. 180 (1911), relied on so heavily by appellants, is not applicable here because of an essential factual difference between that case and this. In *Grizzard,* the land taken lay between

Grizzard's remaining land and his access road. Here the land taken lay between appellants' remaining land and open desert. There was nothing on the other side of the corner of appellants' land to which they can claim a right of access; they have not been cut off from anything. All this is not to say that destruction of existing access is not compensable. It is. *Cravens* v. *United States,* 163 F. Supp. 309 (W.D. Ark. 1958). But here the Government has not destroyed appellants' access rights.

The owner of land has a private property right in a highway if the only access to his land is over that highway, *Schiefelbein* v. *United States,* 124 F. 2d 945, 947 (C.A. 8, 1942); *United States* v. *Welch,* 217 U.S. 333, 339 (1910), and destruction of this private property right would be a taking for which compensation must be paid. U.S. Highway 30 is the existing access road to appellants' land now just as it always has been. The evidence does not show that access over U.S. 30 has been or will be destroyed either by the taking or by the whole highway project. Since U.S. 30 as it runs through appellants' land is to remain the same (R. 34-35), appellants cannot complain that their access has been destroyed.

Appellants can and do complain that their access to their land has been made less convenient by the building of the Interstate. U.S. 30 is to be obliterated at a point where it and the Interstate intersect, some eight miles toward Boise from appellants' land (R. 32-33). After the Interstate is finished, the most convenient way by which appellants will be able to reach Boise is by going 4.8 miles away from Boise to a point where they can get on to the Interstate and drive back toward Boise (R. 32). There are at least three independent

reasons why no error was committed by the court below in this connection. First, there was no evidence or offer of proof that, putting aside the loss of business, any added inconvenience in getting to Boise, 35 miles away, and other cities in that direction caused any substantial loss in market value of appellants' property. Access to Mountain Home, the nearest populous center, does not appear to have been substantially impared. While at this particular place the distance to Boise may have been increased, there is no showing that the total result of the project substantially impairs access to that city, having in mind relevant factors such as total distance, speed of travel, reduction of grades, increased safety and other advantages of modern freeways.

A second answer is the legal recognition of the facts we have been discussing in the rule that mere inconvenience of travel is no ground for the award of compensation. *Ralph* v. *Hazen,* 93 F. 2d 68, 71, 68 App. D.C. 55 (1937). Thus, this Court, in *State of Washington* v. *United States,* 214 F. 2d 33 (1954), cert. den. 348 U.S. 862, held that mere inconvenience of added distance between particular points in the State resulting from taking of a state highway did not establish necessity for relocation so as to require the United States to pay substantial compensation. It would follow that no vested rights had been taken from individuals required to travel farther.[2]

A third reason is the fact that any claim arising out of vacation of U.S. 30, some eight miles away, should

[2] That distance is not the sole criterion is made clear by this Court's statement (214 F. 2d at p. 42) that while an alternative route was longer than that condemned it was "faster, more comfortable and took no longer time."

be presented in proceedings which we assume were had under state law to abandon that state highway. That would, of course, be a separate state matter to which the United States is not a party.[3] It has nothing to do with the present action to determine compensation owing for taking the 2.38-acre tract. *Oyster Shell Products Corp* v. *United States,* 197 F.2d 1022, 1023 (C.A. 5, 1952), cert. den. 344 U.S. 885; *State Road Department of Florida* v. *United States,* 166 F. 2d 843, 845 (C.A. 5, 1948).

B. *Appellants never had any right of access to the Interstate Highway and thus denial of access to the Interstate deprives them of nothing for which they must be paid:*—The problem of whether an abutting landowner has any right of access to a new highway is a new one for the federal courts but has been frequently treated by the state courts, as we shall see. Fundamental to the postition of the United States in this case is the distinction between a "land-service road" and a "traffic-service road." A land-service road is "the normal, ordinary road or highway, which is regarded as being intended primarily to enable abutting landowners to have access to the outside world, as distinguished from the limited-access road which is a 'traffic-service road' designed primarily to move through traffic." Annotation, 43 A.L.R. 2d 1072, 1074n. Of the two highways involved in this case, U.S. 30 is a land-service road, the Interstate a traffic-service road.

[3] The Interstate Highway Program is primarily a state undertaking with federal financial and other assistance. When requested, the United States may exert its eminent domain power to assist the project. The federal action here was required because of lack of state authority to acquire immediate possession.

There is no doubt that an abutting landowner has a right of access to a land-service highway, though there is some doubt as to the origin of this right. See Wilkie Cunnyngham, *The Limited-Access Highway from a Lawyer's Viewpoint*, 13 Mo. L. Rev. 19, 31-32 (1948); *Freeways and the Rights of Abutting Owners*, 3 Stanford L. Rev. 298, 299 (1951); Owen Clarke, *The Limited-Access Highway,* 27 Wash. L. Rev. 111, 116 (1952). Plainly the purpose of a land-service road would be frustrated if the owners of the land being served could not get onto it. But an abutting landowner has no right of access to a traffic-service road, for such a road is not built to serve abutting landowners but to facilitate movement of traffic. As it is plain that allowing all abutters access to a road slows traffic and makes travel more dangerous, access to traffic-service roads has been limited so that those roads may better fulfill their purpose.

The only cases in which abutting landowners have been paid for depriviation of right of access to limited-access roads are those in which old land-service roads have been converted into limited-access roads. For example, see *Boxberger* v. *State Highway Commission,* 126 Colo. 526, 251 P.2d 920 (1953). But where no road previously existed at all, the courts have uniformly held that the abutting landowners had no right of access for which they must be paid. *Schnider* v. *State,* 38 Cal.2d 439, 241 P.2d 1, 43 A.L.R.2d 1068 (1952); *People* v. *Thomas,* 108 Cal.App.2d 832, 239 P.2d 914 (1952); *Los Angeles* v. *Geiger,* 94 Cal.App.2d 180, 210 P.2d 717 (1949); *State, By and Through State Highway Com'n* v. *Burk,* 200 Ore. 211, 265 P.2d 783 (1954); *State* v. *Calkins,* 50 Wash.2d 716, 314 P.2d 449 (1957);

Carazalla v. *State of Wisconsin*, 269 Wis. 593, 71 N.W.2d 276 (1955); *State* v. *Clevenger*, 365 Mo. 970, 291 S.W.2d 57 (1956); *Smick* v. *Commonwealth*, 268 S.W.2d 424 (Ky. App. 1954).

The basic reasoning underlying these cases is probably best set forth in 3 Stanford L. Rev. 298, 307-308. In fact, the courts in *Schnider* v. *State; State, By and Through State Highway Com'n.* v. *Burk; State* v. *Calkins;* and *Carazalla* v. *State of Wisconsin* all cited this article and the following passage in support of their position. The passage reads:

> Construction of a New Freeway
>
> Suppose the state buys up a completely new right-of-way for a freeway. Take the clearest case first. *A's* land abuts against *B's* land. Assume the public buys up a right-of-way for a freeway from *B,* extending along the boundary of his property with *A,* but leaving a one-foot wide strip of land along the boundary line. Obviously, there is no change in *A's* legal position. Now, suppose the state took *B's* land right up to the boundary with *A*. Why should *A's* rights suddenly change? The freeway was never *intended,* from its inception, to provide land service to *A*. Rather it was intended to be a traffic service road. The result must be that, since *A* never had a right of access across his property line before, and since no such right was even impliedly given to him by the state, he does not now have a right of access across his property line to the freeway.
>
> What of *B's* rights? Suppose a part of his land along his boundary line with *A* has been taken.

B, of course, will be paid for the land actually taken. But should he also be paid for a right of access to the freeway? Again, a simple consideration of our rationale brings out the answer. The land service road concept is inapplicable. *B* was given no access to the public road. He therefore has acquired no right of access to be taken.

As a final case, consider the situation where the right-of-way purchased runs through *B's* land. In the case of a normal, unrestricted-access highway, *B* will be paid for the land actually taken and also "severance" damage for the separation of the property. If the highway is to be of limited-access design, with *B* having no right of access, the severance of the two parcels will be more complete. *B* should be, and is, paid for this more complete severance, but this is on the basis of severance damage alone and not on any theory of right of access being denied.

Another analysis of the problem also shows us that it would be error to require the United States to pay for the alleged right of access to the new highway. Requiring this would be but another way of saying that the United States must pay appellants for depriving them of the enhanced value of their land, which enhanced value the United States was creating by building the highway in question. But the United States cannot be required to pay for value it has created in the same project for which the land in question is being condemned. *United States* v. *Miller,* 317 U.S. 369, 379 (1943).

The absurdity of allowing compensation for depriva-

tion of access to a new limited-access highway was quite clear to the Supreme Court of Oregon in *State, By and Through State Highway Com'n* v. *Burk, supra,* where it said (265 P.2d at 792):

> Since the statute may be employed, either to extinguish conceded and existing easements in a conventional highway, or to take new land for a non-access highway, *the statutory provision authorizing compensation for rights of access carries with it no implication that an easement of access, which never existed before, is created by filing an action to condemn a non-access highway, and then, eo instanti, extinguished by the bringing of the same action.* The constitution requires compensation for the taking of an easement only if there is an easement to take. If there was none, then the statute which authorizes compensation for such easements does not apply. (Emphasis added.)

This absurdity was also clear to Wilkie Cunnyngham, writing in 13 Mo. L. Rev. 19, 35 (1948):

> In an inquiry into the market value of right-of-access property, the time element is one of the most important factors—"is of the essence." Until the highway is opened to public travel the abutter does not have legal title to any access-right property. The city slicker may have sold the Brooklyn Bridge (which he didn't own) to the gullible stranger; but surely no highway authority would be so gullible as to pay an abutter for access-rights to a new highway which the same highway authority has not yet given to the abutter.

The case before us then is quite clear. Appellants never had any right of access to the Interstate Highway; the United States has given them no right of access by condemning some of their land for use in the Interstate Highway. If appellants had no right of access, the United States has not taken such a right away and owes appellants no compensation for any such right.

C. *Appellants have made no offer of proof of damages resulting from loss of access to the new highway:* —Even if by some magic appellants were found to have a right of access to the new highway for the construction of which their land was taken, no offer was made to prove damages for loss of that alleged right. As we have emphasized, the only offer of proof was as to damages to the business on old highway U.S. 30.

CONCLUSION

As the United States has paid appellants just compensation for all that has been taken from them, it is submitted that the judgment of the district court should be affirmed.

Respectfully,

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